2000

Provo City v. David G. Cannon : Petition for Writ of Certiorari

Utah Supreme Court

IN THE UTAH SUPREME COURT

PROVO CITY,	)	
	)	
Appellee/Respondent,	)	Supreme Court case No. 20000024-SC
	)	Court of Appeals No. 9811194-CA
vs.	)	
	)	
DAVID G. CANNON,	)	Priority No. 12
	)	
Appellant/Petitioner.	)	

PETITION FOR WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

This petition for Writ of Certiorari arises out of an appeal from the Fourth Judicial District Court in and for Utah County, State of Utah, before the Honorable Gary D. Stott, from a conviction of Child Abuse, a class A misdemeanor.

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IN THE UTAH SUPREME COURT

PROVO CITY, Appellee/Respondent, vs. DAVID G. CANNON, Appellant/Petitioner.	)))))))))	Supreme Court case No. _____ Court of Appeals No. 9811194-CA Priority No. 12

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QUESTIONS PRESENTED FOR REVIEW

Did the Utah Court of Appeals err in its determination that a conviction for a violation of the offense of Child Abuse, a class A misdemeanor [§76-5-109(3)(a) U.C.A.] can be legally supported by evidence sufficient to establish that the accused committed an act that placed a child in a condition that potentially imperilled or threatened the child's health or welfare without evidence sufficient to establish that the accused actually caused a physical injury to the child or actually impaired the physical condition of the child?

OPINION OF THE UTAH COURT OF APPEALS

The OPINION of the Utah Court of Appeals in Provo City v Cannon, Case No. 981194-CA, was filed on 2 December, 1999. A copy of that decision is attached hereto as an Appendix.

JURISDICTION OF THE UTAH SUPREME COURT

The Utah Court of Appeals issued its OPINION on 2 December, 1999. This Petition is, therefore, timely if filed on or before 4 January, 2000, pursuant to Rules 22(d) and 48(a) of the Utah Rules of Appellate Procedure. Additionally, this Court has jurisdiction to consider this Petition pursuant to §78-2-2(5) and §78-2a-4, U.C.A.

CONTROLLING STATUTES and CONSTITUTIONAL PROVISIONS

Utah Code Annotated, §76-5-109(3)(a):

> (3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict a physical injury upon a child is guilty of an offense as follows:
>
> (a) if done intentionally or knowingly, the offense is a class A misdemeanor[.]

Utah Code Annotated, §76-5-109(1)(c):

> (1) As used in this section:
>
> (a) ....
>
> (b) ....
>
> (c) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:
>
> (i) a bruise or other contusion of the skin;
>
> (ii) a minor laceration or contusion;
>
> (iii) failure to thrive or malnutrition;
>
> (iv) any other condition which imperils a child's health or welfare and which is not a serious physical injury as defined in Subsection (1)(d).

STATEMENT OF THE CASE

David G. Cannon was convicted of Child Abuse, §76-5-109, U.C.A., after a bench trial heard by the Honorable Gary D. Stott, Judge, Fourth Judicial District, in and for Utah County. Cannon had moved for dismissal of the charges at the close of the City's case-in-chief arguing that the City had failed to offer any proof of a resulting physical injury to the child. The trial court denied the motion. Defendant rested without offering a further defense. Judgment was entered on the verdict of guilt but sentence was stayed when the trial court entered a Certificate of Probable Cause [Rule 27, Utah Rules of Criminal Procedure]. Cannon appealed from the Judgment to the Utah Court of Appeals. The trial court's Judgment was affirmed by the Court of Appeal's Opinion filed on 2 December, 1999, in which Judge Norman H. Jackson and Judge

Gregory K. Orme concurred in the opinion of Judge Pamela T. Greenwood. Cannon hereby appeals from the Opinion of the Utah Court Of Appeals.

STATEMENT OF RELEVANT FACTS

In its OPINION in this case, the Utah Court of Appeals adequately set forth the facts relevant to Cannon's appeal to that Court, which facts are likewise relevant in Cannon's appeal to this Court:

> On March 13, 1996, defendant held the nine-month-old son of Christine Armstrong over the railing of defendant's Third-story (sic) apartment balcony. Several witnesses observed the incident, including defendant's wife, Cami, who told the defendant to stop. Defendant then pulled the child back over the railing, and a neighbor took the baby from defendant (Opinion, paragraph 2).

Cannon takes no objection to this statement of the facts, specifically noting that the trial court did not find nor did the Court of Appeals affirm that the evidence was sufficient to prove that the child sustained an actual physical injury or that the child's actual physical condition was affected in any manner.

ARGUMENT

POINT I

THE UTAH COURT OF APPEALS ERRED IN DETERMINING THAT A CONVICTION FOR A VIOLATION OF §76-5-109(3)(A) U.C.A. CAN BE LEGALLY SUPPORTED BY EVIDENCE SUFFICIENT TO ESTABLISH THAT THE ACCUSED COMMITTED AN ACT THAT PLACED A CHILD IN A CONDITION THAT IMPERILLED OR THREATENED THE CHILD'S HEALTH OR WELFARE WITHOUT EVIDENCE SUFFICIENT TO ESTABLISH THAT THE ACCUSED ACTUALLY CAUSED A PHYSICAL INJURY TO THE CHILD OR ACTUALLY IMPAIRED THE PHYSICAL CONDITION OF THE CHILD.

The proper determination of this issue depends on the correct meaning and significance of §76-5-109(1)(c)(iv). Cannon acknowledges that the Court of Appeals applied the correct

methodology[1] but respectfully disagrees with the Court's interpretation of the interplay of the various subsections of the statute. Simply put, the Court of Appeals determined that placing a child in a condition of *potential* harm falls within the intent of the legislature, while Cannon argues that, to support a conviction, the plain meaning of the statute requires that an actor actually *cause* a harm to a child - that the City was required to prove a resulting injury to the child or to prove Cannon actually adversely affected the physical condition of the child.

The Court of Appeals concluded "under Utah's child abuse act, physical injury can include acts that imperil or threaten a child's health or welfare without an actual physical impact on the child" (Opinion, paragraph 14).[2] Cannon believes the Court erred by interpreting subsection76-5-109(1)(c)(iv) isolated from and out of the context of the meaning of the section within which it exists and the overall scheme of the child abuse act.[3] When considered in the context of the rest of the section it modifies, the term "any other condition which imperils the child's health or welfare" [§76-5-109(1)(c)(iv)] has a significance different from that given it by the Court of Appeals.

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[1]See citations and principals of statutory construction noted in paragraph 6 of the Opinion of the Court of Appeals.

[2]Cannon assumes that by the repeated use of the term "physical impact" in its Opinion, the Court of Appeals does not imply that Cannon means to argue that this statute applies only in cases in which an actor strikes or hits a child. In fact, at oral argument, Cannon suggested that subjecting a child to a severe sunburn might be an example of creating an adverse physical condition in a child that the statute seeks to criminalize. Both below and here Cannon argues that conviction under the statute requires proof of *either* a physical injury *or* a demonstrated adverse effect on the physical condition of the child, such as was not proved in this case

[3]When "construing a statute, our primary purpose '" is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve."'" Wilson v Valley Mental Health, 969 P.2d 416, 418 (Utah, 1998).

Subsection (iv) exemplifies the definition of "physical injury" as set forth in subsection (1)(c), to wit: "an injury to or a condition of a child which impairs the *physical condition* of the child ...."(Emphasis added.) Thus, logically, the *condition* to which subsection (iv) refers is the *physical condition of a child* noted in subsection (1)(c). It is clear from the entire section that the legislature intended that the term "physical injury" means a demonstrable injury *to* the child or a demonstrable adverse effect on the physical condition *of* the child not a condition *around* the child which might potentially result in an injury. Therefore, it was not enough for the City to have proved Cannon caused a condition in which the child was *potentially* harmed. Rather, it was necessary for the City to have proved that Cannon caused an actual injury to the child or in some other manner affected condition of the child in a way that demonstrated an impairment of the *physical condition* of the child. This the City did not prove.

Further, the term "any other condition which imperils the child's health or welfare" [§76-5-109(1)(c)(iv)] must be interpreted in the context of subsection 76-5-109(3)(a)[4] which sets forth the operative language criminalizing the act of one who "inflicts upon a child physical injury...." The Court of Appeals apparently ignored the meaning and intent of this section when interpreting the meaning and significance of subsection 76-5-109(1)(c)(iv). The American Heritage Dictionary defines "inflict" as: "1. To deal or mete out (something punishing or burdensome); impose. 2. To afflict." Because rules of statutory interpretation mandate the assumption that "the Legislature used each term advisedly"[5], the term "inflict" must be viewed as relevant to the overall scheme of the entire child abuse act. Consequently, the section under which Cannon was

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[4]See footnote 3.

[5]Versluis v Guaranty National Cos., 842 P.2d 865, 867 (Utah, 1992).

prosecuted proscribes one from "dealing or meting out" or "imposing" or "afflicting" upon a child an injury or condition which impairs the physical condition of the child. Certainly, the legislature purposely used the word "inflict" to express its intent that the crime occurs when one actually causes an injury to or adversely affects the physical condition of a child, as opposed to creating a condition where such an injury *might* be caused.[6]

CONCLUSIONS

When interpreted together, in light of the apparent overall scheme developed by the legislature, subsections 76-5-109(1) and 76-5-109(3) clearly indicate the legislature's intent that the crime of child abuse in Utah occurs only when the actor's conduct results in a proven physical injury to the child or a proven adverse effect to the physical condition of a child and not when the actor's conduct merely puts a child in harm's way.

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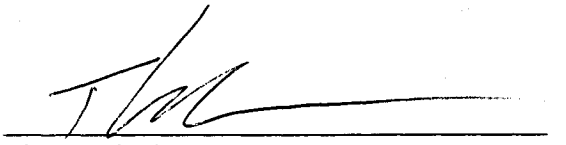
[6]In paragraph 11 of its Opinion, the Court of Appeals explains that under the scheme of the child abuse section "'physical injury' may include conditions that are not the result of physical impact." As examples, the Court notes that the section makes it a crime to cause emotional harm, developmental delay or retardation, starvation, failure to thrive, malnutrition, or impairment of the child's ability to function. Cannon does not disagree with this assessment nor does he dispute that had it been proved that he actually caused any of such conditions in the child, he would have been rightfully convicted. Cannon respectfully argues that the Court of Appeal's analysis fails because it does not recognize that the statute requires that one or more of such conditions must be proved to have resulted from his conduct in order to support his conviction. To be clear, the crux of Cannon's argument is that the statute requires proof of some resulting harm to the child, whether from physical impact or from a demonstrated adverse effect on the child's physical condition. Neither was proved in his case.

PRECISE RELIEF SOUGHT

Because the City of Provo failed to establish evidence that Cannon actually caused a physical injury to the child or actually caused an adverse effect to the physical condition of the child, his conviction should be reversed.

Dated this 30th day of December, 1999.



Thomas H. Means
Attorney for David G. Cannon

CERTIFICATE OF DELIVERY

I hereby certify that on the 3rd day of January, 2000, I mailed two (2) true and correct copies of this PETITION FOR WRIT OF CERTIORARI to the following with all postage pre-paid:

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Deputy Provo City Attorney
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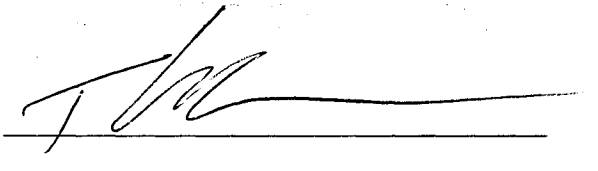

IN THE UTAH COURT OF APPEALS

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Provo City, Plaintiff and Appellee, v. David G. Cannon, Defendant and Appellant.	OPINION (For Official Publication) Case No. 981194-CA F I L E D (December 2, 1999) 1999 UT App 344

Fourth District, Provo Department
The Honorable Gary D. Stott

Attorneys: Thomas H. Means, Provo, for Appellant
Vernon F. Romney, Provo, for Appellee

Before Judges Greenwood, Jackson, and Orme.

GREENWOOD, Associate Presiding Judge:

¶1 Defendant David Cannon appeals his conviction for child abuse, a class A misdemeanor, in violation of Utah Code Ann. § 76-5-109 (1999).[1] We conclude the trial court properly applied the statute and affirm his conviction.

BACKGROUND

¶2 On March 13, 1996, defendant held the nine-month-old son of Christine Armstrong over the railing of defendant's Third-story apartment balcony. Several witnesses observed the incident, including defendant's wife, Cami, who told defendant to stop. Defendant then pulled the child back over the railing, and a neighbor took the baby from defendant.

¶3 Christine Armstrong, accompanied by two witnesses, went to the Provo City Police Department on April 23, 1996, to report the incident. Sergeant Gary Hodgson met with the women and

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1. Section 76-5-109 was amended in 1997, 1998, and again in 1999. No substantive changes were made in any of these amendments; we therefore cite to the most recent version of this statute, even though defendant was charged with the offense on January 7, 1997.

subsequently interviewed defendant concerning the allegations. On May 24, 1996, defendant voluntarily submitted to questioning and denied the allegations.

¶4 Based on the witnesses' statements made during Sergeant Hodgson's investigation, the county attorney filed child abuse charges against defendant under section 76-5-109 of the Utah Code.[2] At trial, defendant moved to dismiss the charges after the State presented its case, arguing the State had offered no evidence of a physical injury as required by the statute. The trial court denied the motion,[3] and defendant rested without presenting a defense. The trial court then convicted defendant of one count of class A misdemeanor child abuse.[4] Defendant

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2. Defendant was charged under subsection (3) of the child abuse statute, which states:

> Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:
>
> (a) if done intentionally or knowingly, the offense is a class A misdemeanor;
>
> (b) if done recklessly, the offense is a class B misdemeanor; or
>
> (c) if done with criminal negligence, the offense is a class C misdemeanor.

Utah Code Ann. § 76-5-109(3) (1999).

3. In denying defendant's motion for a directed verdict, the trial court stated:

> Well, as I read the statute, I find that physical injury as defined in subsection (4) of that paragraph, as [the Deputy County Attorney] has referred to it, as any other condition which imperils, and the other condition in this instance may well be the condition of placing the child over the railing, which would imperil the child's health or welfare. That is a factor of the physical injury as defined by the statute.

4. Defendant urges us, alternatively, to conclude his conduct was either reckless or negligent and reduce his conviction to a class B or C misdemeanor. His argument on this point, however, consisted of a one-sentence footnote at the end of his appellate brief. We therefore decline to address it. See Utah R. App. P. 24(a)(9); State v. Wareham, 772 P.2d 960, 966 (Utah 1989).

appeals, arguing the trial court erred by ruling his conduct fell within the purview of the child abuse statute.

ANALYSIS

¶5 The precise issue before us is whether the trial court correctly determined that Utah's child abuse statute and its definition of "physical injury" can be applied to the facts of this case. Defendant contends the State presented no evidence establishing a physical injury or an impairment to the child's physical condition. Our analysis is thus limited to whether defendant "imperil[ed] the child's health or welfare" even though there was no physical impact on the child. "The interpretation of a statute is a question of law, which we review for correctness." State v. Lowder, 889 P.2d 412, 413 (Utah 1994) (citing State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993)).

¶6 When "construing a statute, our primary purpose '"is to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve."'" Wilson v. Valley Mental Health, 969 P.2d 416, 418 (Utah 1998) (citations omitted). In doing so, we assume "the Legislature used each term advisedly, and we give effect to each term according to its ordinary and accepted meaning." Versluis v. Guaranty Nat'l Cos., 842 P.2d 865, 867 (Utah 1992). "[W]e look first to [the statute's] plain language as the best indicator of the legislature's intent and purpose in passing the statute. Only if that language is ambiguous do we turn to a consideration of legislative history and relevant policy considerations." Wilson, 969 P.2d at 418 (citation omitted); see also Utah Code Ann. § 76-1-106 (1999) ("The rule that a penal statute is to be strictly construed shall not apply to this code . . . . All provisions of this code . . . shall be construed according to the fair import of their terms . . . ."); In re K.T.S., 925 P.2d 603, 604 (Utah Ct. App. 1996). That the parties disagree about the meaning of a statute does not necessarily make the statute ambiguous. See Derbidge v. Mutual Protective Ins. Co., 963 P.2d 788, 791 (Utah Ct. App. 1998). "'A statute is ambiguous [only] if it can be understood by reasonably well-informed persons to have different meanings.'" Id. (alteration in original) (quoting Tanner v. Phoenix Ins. Co., 799 P.2d 231, 233 (Utah Ct. App. 1990)).

¶7 The statute in question, section 76-5-109 of the Utah Code, prohibits the intentional, knowing, reckless, or criminally negligent infliction of a physical injury on a child. See Utah Code Ann. § 76-5-109(3). Subsection (1)(c) of that statute defines "physical injury" as:

> an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;
(ii) a minor laceration or abrasion;
(iii) failure to thrive or malnutrition; or
(iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in subsection (1)(d).

(Emphasis added.)

¶8 A separate provision of the statute defines "serious physical injury," in part, as:

> any physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including:
>
> . . . .
>
> (vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function;
>
> . . . .
>
> (x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

Utah Code Ann. § 76-5-109(1)(d) (1999).[5]

¶9 Defendant argues that, under the statute's scheme, the plain meaning of "physical injury" requires a physical impact on a child. Specifically, he points to the examples of physical injuries listed in subsections (1)(c)(i), (ii), and (iii)--each of which involves a physical impact--and argues that the meaning of "imperil" in subsection (1)(c)(iv), to be consistent with the other subsections, must require a physical impact. Because the

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5. The determination of whether a defendant inflicts "physical injury" or "serious physical injury" also determines the degree of offense. A defendant who inflicts serious physical injury can be charged with a greater degree of criminal liability, ranging from a class A misdemeanor for criminally negligent conduct to a second degree felony for intentional or knowing conduct. See Utah Code Ann. § 76-5-109(2) (1999).

State presented no evidence that defendant's conduct had a physical impact on the child, defendant contends he did not imperil the child's health or welfare and thus his conviction cannot stand.

¶10 We first acknowledge that the Legislature has the power to define statutory terms as it wishes, and we are bound by those definitions. See 1A Norman J. Singer, Sutherland Statutory Construction § 20.08 (5th ed. 1993 & Supp. 1999) (citing McWhorter v. State Bd. of Registration for Prof'l Eng'rs, 359 So. 2d 769 (Ala. 1978)). Even if the chosen definition in this case "does not coincide with the ordinary meaning of the words," id., the definition is not "arbitrary, [does not] result in unreasonable classifications [and is not] uncertain." Id. (citations omitted). Furthermore, the definition is consistent with the rest of the statute as a whole and its general purpose, "which is to curb the increase in child abuse by imposing stiffer penalties on child abusers." State v. Jones, 735 P.2d 399, 402 (Utah Ct. App. 1987) (citation omitted). The Legislature's chosen language defining "physical injury" therefore controls the meaning of that term throughout the statute.[6] See Sutherland Stat. Constr. § 20.08, at 90.

¶11 We do not read the statutory definition as requiring some physical impact in order to imperil a child's health or welfare. Nowhere in the statute does the Legislature indicate physical injury is limited only to conditions resulting from a physical impact. In fact, the opposite is true. The statute's definition of "serious physical injury" includes injuries that can result from nonphysical abuse. See Utah Code Ann. § 76-5-109(1)(d)(vii) ("any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function"); id. at § 76-5-109(1)(d)(x) ("any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life"). Likewise, under the Legislature's definitional rubric, "physical injury" may include conditions that are not the result of physical impact.

¶12 Our reading of subsection (1)(c) comports with our previous declaration about these definitions. In Jones, the defendant argued that "physical injury" and "serious physical injury," as defined by the statute, were "two totally self-standing and independent concepts." 735 P.2d at 402 n.3. We rejected that notion, stating the definitions were part of "an integrated and carefully drawn statute," especially because "the text

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6. Because we conclude the statute's language is not ambiguous, we need not consider the Legislature's intent in passing section 76-5-109. See Wilson, 969 P.2d at 418.

introducing the definitions makes clear that the definitions are to be used throughout the entire statutory section." Id.

¶13 The statute, however, does not define "imperil"; we thus look to the term's ordinary and accepted meaning. See Versluis, 842 P.2d at 867. Webster's defines "peril" as "exposure to the chance of injury," Webster's Dictionary 581 (New Rev. Updated Ed. 1999), and "imperil" as to "endanger." Id. at 418.[7] Endangerment is precisely what the trial court found occurred in this case when defendant, for some unfathomable reason, suspended an infant by his arms over a third-story balcony railing for several minutes. Defendant does not challenge the trial court's finding that this conduct imperiled the child, given the definition approved by this court and applied by the trial court.

¶14 Thus, under Utah's child abuse act, physical injury can include acts that imperil or threaten a child's health or welfare without an actual physical impact on the child. Consequently, we affirm defendant's conviction.

Pamela T. Greenwood,
Associate Presiding Judge

¶15 I CONCUR:

Norman H. Jackson, Judge

¶16 I CONCUR IN THE RESULT:

Gregory K. Orme, Judge

---

7. We note that our reading of "endangerment" is in line with other jurisdictions' interpretations of statutes using the term. See, e.g., State v. Deskins, 731 P.2d 104, 105-06 (Ariz. Ct. App. 1986); People v. Odom, 226 Cal. App. 3d 1028, 1032-33 (Cal. Ct. App. 1991).

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of December, 1999, a true and correct copy of the attached OPINION was deposited in the United States mail to:

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and a true and correct copy of the attached OPINION was deposited in the United States mail to the judge listed below:

HONORABLE GARY D STOTT
FOURTH DISTRICT, PROVO DEPT
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Holli Hayes
Judicial Secretary

TRIAL COURT: FOURTH DISTRICT, PROVO DEPT, 971-240
APPEALS CASE NO.: 981194-CA